

**A Pembangunan Wang Kita Sdn Bhd v
Fry-Fry Marketing Services Sdn Bhd**

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-117
OF 1997

**B LOW HOP BING J
10 NOVEMBER 1997**

Land Law — Restraints on dealings — Caveats — Application for removal of caveat — Caveatable interest — Caveator failed to comply with terms of sale and purchase of shares of companies — Whether caveator had acquired right to enter caveat on land —

C Whether such failure constituted fundamental breach by caveator — Whether caveat should be allowed to remain — National Land Code 1965 s 323(1)

D The plaintiff was at all material times the registered owner of a piece of land identified as HS (D) 3783 PT 7020 Mukim Tanjung Dua Belas, Daerah Kuala Langat ('the land'). The plaintiff had altogether three shareholders who were also the directors of the plaintiff. Sometime in July 1994, the plaintiff's shareholders wanted to sell the land and another piece of land owned by one Menara Mutiara Sdn Bhd ('MM') for a total consideration of RM38m. The transaction was to be effected by way of the sale and purchase of all the issued and paid-up capital of the plaintiff and MM. On 27 July 1997, the plaintiff wrote to the defendant's solicitors requiring the defendant to place an earnest deposit of 2% of the total consideration on or before 8 August 1994. On 12 September 1994, pursuant to a letter from the plaintiff's solicitors, the defendant paid a sum of RM100,000 as part of the earnest sum. It was, inter alia, a term of the letter of 12 September 1994 which was agreed upon by the defendant's solicitors that: (i) the balance of RM660,000 as 2% earnest deposit was to be paid within two weeks from the date of the letter; and (ii) the defendant was only entitled to enter a caveat upon payment of 10% of the total consideration. On 21 September 1994, the defendant's solicitors wrote to the plaintiff's solicitors requesting the plaintiff's audited and management accounts ('the accounts') in order for the balance of RM660,000 to be paid by 26 September 1994. The plaintiff's solicitors in a reply dated 23 September 1994 indicated that the accounts would not be supplied until and unless the sum of RM660,000 was paid. In any event, the sum was never paid. The defendant entered a private caveat on the land, contending that the agreement between the parties was evidenced partly in writing on 12 September 1994 and by a collateral agreement on 7 September 1994 and 12 September 1994. The defendant alleged that on 7 September 1994 it was agreed that as the accounts were not produced, the parties had agreed to reduce the earnest deposit to only RM100,000 whereas on 12 September 1994 it was further agreed collaterally that the balance of RM660,000 would only be payable upon receipt of the accounts. This obligation had yet to arise and as a result of the anticipatory breach of the shareholders of the plaintiff and/or the plaintiff/MM, the defendant was entitled to caveat

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the land. The plaintiff by way of an originating summons applied to remove the private caveat contending that: (i) as the defendant had failed to pay the sum of RM660,000 within the stipulated time frame, the defendant had no right to caveat the land; and (ii) as the agreement of 12 September 1994 was for the purchase of shares, the private caveat could not be entered over the land.

Held, ordering the removal of the caveat:

- (1) The terms of the agreement between the parties had been incorporated by the parties in the letter dated 12 September 1994, and the terms of which must be followed. However, the defendant had committed a fundamental breach from the beginning and failed to pay the balance sum of RM660,000 as the 2% earnest deposit within 14 days from 12 September 1994. It had also been expressly agreed by the parties that the defendant was only contractually entitled to caveat the land if the defendant paid 10% of the total purchase price. The plaintiff in accordance with the agreement and by way of a letter dated 23 September 1994 demanded compliance by the defendant. The defendant failed to do so and the breach was on the part of the defendant (see p 716F-I).
- (2) The defendant had unilaterally introduced a new term regarding the supply of the accounts and as a condition precedent to the payment of 2% earnest deposit, the new term of which had never been accepted by the plaintiff. This issue hinged solely on the construction of the letter of 12 September 1994 which was unconditionally accepted by the defendant's solicitors in which event the terms and conditions contained were legally binding on the parties. The defendant was prohibited by ss 91 and 92 of the Evidence Act 1950 from varying or contradicting the terms and conditions contained in the letter of 12 September 1994. Having failed to perform its obligations, the defendant could not acquire any rights whatsoever to enter the private caveat (see p 717B-F); *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996] 4 CLJ 94 and *Eng Mee Yong v V Letchumanan* [1979] 2 MLJ 212 followed.
- (3) On the question of whether the defendant had disclosed a caveatable interest, even upholding the defendant's contention that the sale of the entire shares of the defendant was synonymous with the sale of the land, the fundamental issue was the complete failure of the defendant to perform its obligations as contained in the letter of 12 September 1994. Such a failure constituted a fundamental breach by the defendant and the private caveat could not be allowed to remain (see pp 718I and 719A-D); *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Wu Shu Chen v Raja Zainal Abidin bin Raja*

- A *Hussin* [1997] 2 MLJ 487 and *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864 followed.

[Bahasa Malaysia summary]

- B Pada semua masa material plaintif merupakan pemunya berdaftar sebidang tanah yang diiktiraf sebagai HS (D) 3783 PT 7020 Mukim Tanjung Dua Belas, Daerah Kuala Langat ('tanah tersebut'). Plaintif mempunyai tiga pemegang saham yang juga merupakan pengarah plaintif. Pada bulan Julai 1994, pemegang saham plaintif ingin menjual tanah tersebut dan satu lagi bidang tanah yang dimiliki oleh Menara Mutiara Sdn Bhd ('MM') untuk jumlah balasan bernilai RM38 juta.
- C Transaksi hendaklah dilaksanakan melalui jual beli kesemua modal plaintif dan MM yang diterbitkan dan berbayar. Pada 27 Julai 1997, plaintif telah menulis kepada peguamcara defendan yang menghendaki defendan meletakkan deposit cengkeram sebanyak 2% daripada jumlah balasan pada atau sebelum 8 Ogos 1994. Pada 12 September
- D 1994, menurut sepucuk surat daripada peguamcara plaintif, defendan telah membayar jumlah RM100,000 sebagai sebahagian daripada jumlah cengkeram. Antara lain, adalah merupakan suatu terma surat bertarikh 12 September 1994 yang dipersetujui oleh peguamcara defendan bahawa: (i) baki RM660,000 sebagai 2% deposit cengkeram haruslah dibayar dalam tempoh dua minggu dari tarikh surat itu; dan
- E (ii) defendan hanya berhak memasukkan suatu kaveat setelah membayar 10% daripada jumlah balasan. Pada 21 September 1994, peguamcara defendan telah menulis kepada peguamcara plaintif meminta akaun-akaun yang telah diauditkan dan pengurusan plaintif ('akaun tersebut') bagi membolehkan baki sebanyak RM660,000
- F dibayar pada 26 September 1994. Peguamcara plaintif dalam suatu jawapan bertarikh 23 September 1994 menandakan bahawa akaun tersebut tidak akan disediakan sehingga dan melainkan jumlah RM660,000 dibayar. Walau bagaimanapun, jumlah itu tidak pernah dibayar. Defendan telah memasukkan suatu kaveat persendirian atas
- G tanah tersebut, menghujahkan bahawa sebahagian perjanjian di antara pihak-pihak ditulis adalah dalam bentuk dokumen pada 12 September 1994, dan perjanjian kolateral pada 7 September 1994 dan 12 September 1994. Defendan mengatakan bahawa pada 7 September 1994 ia disetujui bahawa oleh kerana akaun tersebut tidak dikemukakan, pihak-pihak telah bersetuju untuk mengurangkan deposit cengkeram kepada RM100,000 sahaja manakala pada
- H 12 September 1994 ia selanjutnya disetujui secara kolateral bahawa baki RM660,000 harus dibayar atas penerimaan akaun tersebut. Kewajipan ini belum lagi timbul dan akibat kemungkiran pemegang-pemegang saham plaintif dan/atau plaintif/MM yang dijangkakan, defendan berhak mengkaveat tanah tersebut. Plaintif menerusi suatu saman semula memohon untuk membatalkan kaveat persendirian dengan berhujah bahawa: (i) oleh kerana defendan telah gagal membayar jumlah RM660,000 dalam jangkamasa yang ditetapkan, defendan tidak berhak mengkaveat tanah tersebut; dan (ii) oleh
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kerana perjanjian bertarikh 12 September 1994 adalah untuk belian saham-saham, kaveat persendirian tidak boleh dimasukkan atas tanah tersebut. A

Diputuskan, memerintahkan pembatalan kaveat:

- (1) Terma perjanjian di antara pihak-pihak telah diperbadankan oleh pihak-pihak dalam surat bertarikh 12 September 1994, yang mana ia harus diikuti. Namun demikian, defendan telah melakukan kemungkiran yang asas dari mula-mula lagi dan gagal membayar jumlah baki RM660,000 sebagai 2% deposit cengkeram dalam tempoh 14 hari dari 12 September 1994. Ia juga telah disetujui secara nyata oleh pihak-pihak bahawa defendan hanya berhak secara kontraktual untuk mengkaveat tanah tersebut sekiranya defendan membayar 10% daripada jumlah harga belian. Meunurt perjanjian tersebut dan menerusi surat bertarikh 23 September 1994, plaintif telah menuntut pematuhan oleh defendan. Defendan telah gagal berbuat demikian dan kemungkiran adalah pada pihak defendan (lihat ms 716F-I). B C D
- (2) Defendan secara satu pihak telah memperkenalkan terma yang baru mengenai penyediaan akaun tersebut dan sebagai suatu syarat terdahulu kepada bayaran 2% deposit cengkeram, yang mana terma baru tidak pernah diterima oleh plaintif. Isu ini bergantung semata-mata pada tafsiran surat bertarikh 12 September 1994 yang diterima tanpa syarat oleh peguamcara defendan yang mana terma dan syarat yang terangkum mengikat pihak-pihak di sisi undang-undang. Defendan dilarang oleh ss 91 dan 92 Akta Keterangan 1950 daripada mengubah atau menyangkal terma dan syarat yang terangkum dalam surat bertarikh 12 September 1994. Setelah gagal melaksanakan obligasinya, defendan tidak dapat memperolehi apa-apa hak sama sekali untuk memasukkan kaveat persendirian (lihat ms 717B-F); *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996] 4 CLJ 94 dan *Eng Mee Yong v V Letchumanan* [1979] 2 MLJ 212 diikuti. E F G
- (3) Mengenai persoalan sama ada defendan telah mendedahkan kepentingan boleh kaveat, biarpun membenarkan hujah defendan bahawa jualan seluruh saham defendan adalah sama dengan jualan tanah tersebut, isu utama adalah kegagalan defendan untuk melaksanakan obligasinya seperti yang terangkum dalam surat bertarikh 12 September 1994. Kegagalan sedemikian membentuk kemungkiran asasi oleh defendan dan kaveat persendirian tidak boleh dibenarkan kekal (lihat ms 718I dan 719A-D); *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 dan *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864 diikuti. H I

A Notes

For cases on application for removal of caveat and caveatable interest, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2242–2323 and 2328–2380.

B Cases referred to

Eng Mee Yong v V Letchumanan [1979] 2 MLJ 212 (folld)

Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (refd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108 (folld)

Kasivisvanathan Chettiar v Pereira [1976] 2 MLJ 110 (refd)

Kho Ah Soon v Duniaga Sdn Bhd [1996] 2 MLJ 181 (refd)

C *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)

Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)

D *Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29 (refd)

Medan Juta Sdn Bhd v Tsoi Ping Kwan [1996] 1 MLJ 864 (folld)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (folld)

New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd [1996] 4 CLJ 94 (folld)

E *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367 (refd)

Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (folld)

F Legislation referred to

Evidence Act 1950 ss 91, 92

National Land Code 1965 s 323(1), (1)(a), Form 19B

Wong Kim Fatt (Satish Vasudevan Nair and Eugene Jeyaraj with him) (Gulam & Wong) for the plaintiff.

G *D Krishnan (Krishna Dallumah & Co) for the defendant.*

Cur Adv Vult

Low Hop Bing J:

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APPLICATION

This application in encl (1) by way of originating summons was filed by the plaintiff for an order to remove the private caveat vide presentation No 8869A/95 Jilid No 94 Folio No 70 ('the private caveat') entered by the defendant on the plaintiff's land known as HS (D) 3783 PT 7020 ('the land'), Mukim Tanjung Dua Belas, Daerah Kuala Langat and consequentially for an order that damages be assessed and also costs against the defendant.

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FACTS OF THE CASE

The plaintiff is, at all material times, the registered owner of the land while Tan Eng Piow, Ng Bon Chong and Eng Hoi Choo ('the three shareholders') are the registered holders of all the issued shares in the plaintiff and also the directors of the plaintiff.

On or about July 1994, the three shareholders were desirous of selling the land and another piece of land ('the said lands') for RM38m. The sale of the said lands would be by way of selling all the issued and fully paid up shares in the plaintiff and yet another company, ie Menara Mutiara Sdn Bhd ('the two companies').

On or about 27 July 1994, the plaintiff wrote a letter to the defendant's solicitors to state that the two companies and the said lands were available for sale. They were prepared to discuss and consider the sale to M/s Francis Lim & Co's client provided their client put up an offer letter together with an earnest deposit of 2% of the total consideration of RM38m on or before 8 August 1994.

On 12 September 1994, the defendant paid a sum of RM100,000 pursuant to the letter of the plaintiff's solicitors M/s Gulam & Wong ('the plaintiff's solicitors'), the contents of which are so crucial that it is reproduced in extenso as follows:

12 September 1994

Francis Lim & Co
No 432, 1st Floor
Jalan Tun Dr Ismail
70200 Seremban.

Pembangunan Wang Kita Sdn Bhd, Menara Mutiara Sdn Bhd together with their respective land held under HS (D) 3783 PT 7020, HS (D) 3784 PT 7021 in Mukim of Tanjong Dua Belas, Daerah Kuala Langat

We act for Pembangunan Wang Kita Sdn Bhd and Menara Mutiara Sdn Bhd who are the proprietors of the above-mentioned property (sic). Our clients are agreeable to sell the entire shares subject to the following conditions:

- (i) You deposit with us a sum of RM100,000 and a further sum of RM660,000 being 2% as earnest payment within two weeks from the date hereof. In the event you fail to deposit the balance within the stipulated period of 14 days, our clients shall be entitled forfeit (sic) the RM100,000.
- (ii) The sale and purchase agreement shall be prepared and executed within a period of 14 days after payment of the full sum as mentioned in item (i) above.
- (iii) Upon execution of the sales (sic) and purchase agreement you shall pay the remaining deposit sum of eight (8%) per centum.
- (iv) You shall only be entitled to enter a caveat upon payment of the 10% deposit sum vide item (sic) (i) and (ii).
- (v) The time period for the completion of the transaction is 6 month (sic) from the date of execution, inclusive of the FIC approval.

A (vi) For any further extension of time granted our client shall be entitled to interest at the rate of 10% per centum (sic).
Kindly acknowledge receipt if you are agreeable with the terms and conditions above.

Yours faithfully,

B (Signed)
Gulam & Wong

We agree to the above terms.

(Signed)

C Francis Lim & Co
12 September 1994

D On 21 September 1994, the defendant's solicitors wrote to the plaintiff's solicitors requesting for 'audited and management accounts so that the balance of the 2% amounting to RM660,000 could be paid by 26 September 1994'.

E On 23 September 1994, the plaintiff's solicitors replied that the two companies and the three shareholders would not supply the defendant with the said accounts unless and until the defendant paid the sum of RM660,000 which together with the RM100,000 already paid on 12 September 1997 constituted 2% of the total purchase consideration.

F On 27 September 1994, the defendant's solicitors wrote to the plaintiff's solicitors and reminded them that on or about 8 September 1994, their clients had agreed through Ng Bon Chong to give the relevant accounts to the defendant. Be that as it may, the defendant had not paid the sum of RM660,000 to make up the required 2% as the earnest deposit.

ISSUE FOR DETERMINATION

Whether, on the facts as stated above, the defendant has the right to lodge a private caveat against the land?

G PLAINTIFF'S CONTENTION

Since the defendant had failed to pay the sum of RM660,000 on or before 26 September 1994, the defendant has no right to lodge a private caveat against the land.

H The plaintiff further contended that since the agreement dated 12 September 1994 was for the purchase of all the shares in the two companies and not the said lands, the defendant had no right to caveat the plaintiff's land.

I DEFENDANT'S CONTENTION

The defendant contended that on 7 September 1994, since the plaintiff could not come up with the management accounts as at 31 August 1994, the parties had agreed to reduce the earnest deposit from 2% of the

purchase price, ie (RM760,000), to RM100,000. On 12 September 1994, the management accounts as at 31 August 1994 were still not ready; the parties then arrived at a collateral agreement whereby it was agreed that the defendant would pay an earnest deposit of RM100,000, the plaintiff would deliver to the defendant the relevant management accounts within 14 days from 12 September 1994 before the defendant would be required to pay the balance of 2%, ie RM660,000. The defendant contended that the time for payment of the sum of RM660,000 was still not due yet because until today, the two companies and/or the three shareholders have failed to deliver to the defendant the latest audited accounts and the management accounts of the two companies.

The defendant contended that the agreement between the defendant and the two companies was partly evidenced in writing dated 12 September 1994 and partly through the collateral agreement arrived at on 7 September 1994 and 12 September 1994. As a result of the anticipatory breach by the three shareholders and/or the two companies, the defendant had the right to caveat the said lands to protect its claim to an interest in the said lands although it has not paid the 10% deposit.

DECISION OF THE COURT

(1) *Burden of proof*

As the plaintiff is the registered proprietor of the land, the burden is on the defendant as caveator of the plaintiff's land to show that the caveat should not be removed: *Eng Mee Yong v V Letchumanan* [1979] 2 MLJ 212 and *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 (SC) at p 194.

(2) *Terms of the agreement between the parties*

The terms of the agreement between the parties herein have been incorporated by the parties in the letter dated 12 September 1994. Both the plaintiff and the defendant must follow the terms of the agreement. However, the defendant from the very beginning had committed a fundamental breach of the agreement. It paid only RM100,000 for the purchase of the shares in the sum of RM38m from the shareholders of the plaintiff and Mutiara Sdn Bhd. The defendant had failed to pay the balance of 2% in the sum of RM660,000 within 14 days from 12 September 1994. It had been expressly agreed by the parties that the defendant was only contractually entitled to caveat the land if the defendant have paid 10%, ie RM3.8m, of the total purchase price of all the shares agreed at RM38m. On the other hand, the plaintiff — in accordance with the terms of the agreement in the subsequent letter of 23 September 1994 — had demanded compliance by the defendant, but the defendant had failed to do so. Therefore, the breach was clearly on the part of the defendant, not the plaintiff.

A The agreement made no reference whatsoever to any account, let alone 'audited accounts and management accounts'. The defendant's excuse for failing to pay the balance of the 2% in the sum of RM660,000 was that it should have (when it was contractually not entitled to) the 1993 audited accounts and the management accounts up to 31 August 1994 or even the 1995 accounts.

B It seems very clear to me that the defendant here has unilaterally introduced a new term regarding the supply of the accounts as a condition precedent to the payment of the 2%, which new term has never been accepted by the plaintiff and is not an agreed term in the said letter of 12 September 1994. For the purposes of the matter before me, this letter
C must be examined very closely. The question hinges solely on the construction of the terms of this letter which has been unconditionally accepted by Mr Francis Lim Chiew Kwee in which event the terms and conditions contained therein are legally binding on the parties herein: *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 (SC) and *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996]
D 4 CLJ 94. Mr Francis Lim or his client has never tendered the sum due. The defendant is prohibited by ss 91 and 92 of the Evidence Act 1950 from varying or contradicting the terms and conditions contained in the letter of 12 September 1994: see *Eng Mee Yong's* case, pp 216J-217. The supply of audited accounts and management accounts has never been a
E term of the agreement. Nevertheless, the plaintiff was prepared to supply the accounts if the said sum of RM660,000 was paid on or before 26 September 1994. The defendant has failed to do so. It is not in dispute that the defendant was entitled to enter a caveat only 'upon payment of the 10% deposit sum' within the stipulated time. The defendant having failed
F to perform its part of the contract cannot, by any stretch of imagination, acquire any right whatsoever to enter the private caveat.

(3) *The three hurdles*

G In determining the sole issue as to whether the defendant has a caveatable interest on the facts of this case as stated above, I am guided by the principles enunciated by the Court of Appeal in *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782; *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, which may be distilled as follows:
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I In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under s 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

See also *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864.

Whether the defendant as a caveator has disclosed a caveatable interest in his application under s 323(1) A

The grounds of application for the entry of the private caveat are stated in the statutory declaration affirmed by one Francis Lim Chiew Kwee who affirmed in para 2 thereof that the agreement is for the purchase of all the issued and fully paid up shares in the plaintiff but the total price is not disclosed therein. No reference is made to the said letter of 12 September 1994 from M/s Gulam & Wong; neither were the defendant's terms of payment ever disclosed in the statutory declaration. Secondly, in para 5 thereof, the said Francis Lim Chiew Kwee stated that the 'Company have a registrable interest in the said Property'. B

Section 323(1) of the National Land Code 1965 ('the NLC') provides for the person or body at whose instance a private caveat may be entered, viz any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest. From the wording of s 323(1)(a), it is my considered view that only one of the following persons or bodies may enter a private caveat, viz: C

- (i) any person or body *claiming title* to any alienated land;
- (ii) any person or body *claiming any registrable interest* in any alienated land;
- (iii) any person or body *claiming any right to such title*, ie title to any alienated land; or E
- (iv) any person or body *claiming any right to such interest*, ie registrable interest in any alienated land.

By way of illustration, where parties have not entered into a concluded contract by way of a sale and purchase agreement in relation to the land, the caveator defendant was held to have no registrable or caveatable interest: *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* at p 126 (HC) and *Kam Mah Theatre Sdn Bhd v Tan Lay Soon*. F

There must exist a valid agreement for the sale of *land* so that the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement: *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 at pp 54 and 55. G

In cases in which the removal of a private caveat is called into question, the subject matter to be protected is land and not, eg purchase of shares. So where the caveat was entered by a purchaser pursuant to a sale and purchase of land, the caveat was allowed to remain: *Kasivisvanathan Chettiar v Pereira* [1976] 2 MLJ 110 (FC) and *Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29 (FC). H

The Federal Court in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 and the Court of Appeal in *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 MLJ 181 also emphasized that the essential subject matter therein was land as opposed to shares in a company. I

Even by stretching one's imagination to the furthest to uphold the contention of the defendant that sale of the entire shares in the two

- A companies is synonymous with the sale of the said lands owned by these two companies, the fundamental question is still whether this fact gives rise to a registrable interest in order to entitle the defendant to enter the private caveat. In this connection, the letter dated 12 September 1994 is of crucial importance. It has been expressly agreed by the parties thereto that the sale and purchase agreement was to be executed within 14 days of the payment of the RM100,000. The 14-day time frame expired on 26 September 1994 and no such agreement had been executed. It was further an express term of that letter that the defendant shall only be entitled to enter a caveat upon payment of the 10% deposit, ie RM3.8m out of the total consideration of RM38m. There was a complete failure on the part of the defendant to perform these obligations as expressly stated in the letter dated 12 September 1994. Such a failure on the part of the defendant constitutes a fundamental breach by the defendant. In the circumstances, I hold that the defendant has failed to cross the first hurdle and the private caveat cannot be allowed to remain on the register: see *Medan Juta Sdn Bhd v Tsoi Ping Kwan* at p 870, wherein I followed the dictum of Gopal Sri Ram JCA in *Luggage* in these words:
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If it appears that the grounds ... are insufficient in law to support the caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going further.

- E On appeal, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367 at pp 375-376 upheld my decision and pointed out that I had correctly directed myself on the law by reference to the judgment of the Court of Appeal in *Luggage* and *Murugappa Chettiar*.

- F Gopal Sri Ram JCA said in *Luggage's* case at p 743:

.... it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary.

- G By reason of the above, I hold that the defendant's entry of the private caveat is wrongful as the defendant had not disclosed a caveatable interest in its application (Form 19B) under s 323(1) of the NLC. Hence the defendant is unable to cross the first hurdle. I order that the private caveat be hereby removed forthwith, without the necessity of going further. I also make a consequential order that damages be awarded to the plaintiff, to be assessed by the registrar of this court. Costs to be taxed and paid by the defendant to the plaintiff.
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Application allowed.

Reported by Lew Chee Seong